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# Ooi Juan Seng v Public Prosecutor

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HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 42–35 OF 2008
ABANG ISKANDAR JC
23 FEBRUARY 2009

C

*Criminal Law — Criminal breach of trust — Abetment — Assisting principal offender in keying fictitious figures into company system — Whether abetment by conspiracy committed — Factors constituting abetment — Whether established — Penal Code s 107*

D

*Criminal Procedure — Charge — Abetment — Framing or particulars of — Defective — Charge included acts of keying in fictitious figures into company's system — Whether superfluous and unnecessary — Whether mere irregularity — Whether vitiated whole proceedings — Criminal Procedure Code s 422*

E

*Evidence — Confession — Admissibility of confession — Confession made to SP1, appellant's superior — Whether SP1 a person in authority — Whether confession made without any inducement — Evidence Act 1950 s 24*

F

The appellant's appeal herein was against the conviction entered and sentence imposed against him for abetting the criminal breach of trust. The sessions court ('SCJ') sentenced the appellant to four years imprisonment. However, a stay of execution of the said sentence had been granted pending the hearing of this appeal. In this case, the appellant helped one Eugene Chai, the principal offender, to commit criminal breach of trust ('CBT') on the company's collection from its customers by way of manipulating the company's account system by keying in fictitious figures purported to show that payments that had been due had been paid and accounted for although, as a matter of fact, those cash payments had been siphoned off and shared between the appellant and Eugene. Accordingly, the appellant was charged for taking part or aiding Eugene Chai in the commission of the offence of CBT by manipulating the accounts of the company. Before this court, the appellant contended that the court below had erred in not having ruled that the purported confession made to SP1, the appellant's superior, had been given as a result of an inducement exercised by SP1 on the appellant. It was further contended that even on the supposition that the said confession, as contained in P1 and P2, was admissible, the charge (P3) for abetment by aiding as preferred against the

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appellant could not be sustained because the alleged conduct or acts attributed to the appellant cannot in law amount to abetment by aiding.

**Held**, dismissing the appeal:

(1) SP1 was, in the circumstances of this case a person in authority, in so far as the appellant was concerned. From the facts of this case, it can be readily inferred that SP1 was an agent of SP2 and of the company's management team who were in the midst of investigating into the suspected irregularities in the company's financial accounts in the system where the appellant was one of those people in the company who had exclusive access into the said system and whose unique password/code had been suspected to have been used to key in fictitious figures into the system thereby giving an impression that payments which were due in those accounts had indeed been accounted for (see para 9).

(2) The court below was justified in its finding on the matter of the alleged inducement. This court agreed with the court below that there was no inducement emanating from SP1 that had been brought to bear on the appellant. In fact, the SCJ had said at p 255 of the RoA as follows: 'Daripada keterangan pernyataan tertuduh yang menyatakan bahawa beliau telah diugut dan dijanji serta diberi dorongan adalah tidak berasas'. Such being the case, the court below was correct in finding that the confession was therefore given voluntarily and ought to be admitted as evidence against the appellant and marked as P1 and P2 (see para 11).

(3) The acts of the appellant in abetting by aiding Eugene Chai were mere acts which were consequences of the agreement that had been reached between him and Eugene before Eugene could begin his illegal and criminal enterprise, namely the CBT. Without the appellant's consent to manipulate the company's account, Eugene would not have committed the CBT because there was no way he could deprive the cash belonging to his company of which he was an agent, from the company's customers without being detected. So, the act of abetment by this appellant had resulted in Eugene proceeding on with his scheme to CBT the company's cash collection. The appellant's complicity in the illegal enterprise had substantially assisted Eugene towards the commission of the crime of CBT. Thus, from the evidence adduced, clearly an offence of abetment by way of aiding had been committed by the appellant (see para 22).

(4) In fact, what was set out in the charge P3 consisted of acts which were part of an integral agreement between the appellant and Eugene. Although they appeared to be done after the acts of CBT had been completed, they were acts which were actuated and motivated by the earlier agreement between them. In that sense, these acts were pre-arranged to cover the tracks of their unlawful design which was clearly discernible in P1 and P2 (see para 26).

(5) In this case, the charge was for abetment, and there was no need for the prosecution to particularise the exact acts of the appellant that were thought to be manifestations of abetment. That would go to evidence. The inclusion in the charge of the acts of keying in the fictitious figures into the system of the appellant's company had been superfluous and unnecessary to be put in the charge for abetment. However, that would not render the charge defective. If anything, it tried to say much more than has been legally required. It had not occasioned any prejudice to the appellant in the preparation of his defence whereby causing a failure of justice. The error in the framing of the charge (P3) by the prosecution therefore had amounted to a mere irregularity that ought not to vitiate the whole proceedings (see para 30).

(6) On the available evidence, the appellant had committed limb (c) of abetment under s 107 of the Penal Code read with s 409 of the same Code. Likewise, his acts had also fulfilled limb (b) of the same section. He could have been convicted on either one of the said limbs. Either way, the appellant had clearly committed the criminal act of abetment as envisaged under s 107 of the Penal Code (see para 31).

**[Bahasa Malaysia summary**

Rayuan perayu di sini adalah terhadap sabitan yang dimasukkan dan hukuman yang dikenakan terhadapnya kerana bersubahat dengan jenayah pecah amanah. Hakim mahkamah sesyen ('HMS') telah menjatuhkan hukuman penjara selama empat tahun ke atas perayu. Walau bagaimanapun, penggantungan pelaksanaan hukuman tersebut telah diberikan sementara menunggu perbicaraan rayuan ini. Dalam kes ini, perayu telah membantu Eugune Chai, pesalah utama, untuk melakukan jenayah pecah amanah ('JPA') ke atas kutipan pelanggan syarikat melalui manipulasi sistem perakaunan syarikat dengan memasukkan jumlah palsu yang bertujuan menunjukkan bahawa bayaran-bayaran yang tertunggak telah dibayar dan dijelaskan meskipun, pada hakikatnya, bayaran tunai tersebut telah disalurkan kepada dan dibahagikan antara perayu dan Eugene. Sewajarnya, perayu dituduh mengambil bahagian atau membantu Eugene Chai dalam melakukan kesalahan JPA dengan memanipulasikan akaun-akaun syarikat. Di hadapan mahkamah ini, perayu berhujah bahawa mahkamah bawahan terkhilaf kerana tidak memutuskan bahawa pengakuan yang dikatakan telah dibuat kepada SP1, ketua perayu, dilakukan akibat dorongan yang disebabkan oleh SP1 ke atas perayu. Selanjutnya adalah dihujahkan bahawa meskipun dengan anggapan bahawa pengakuan tersebut, sebagaimana terkandung dalam P1 dan P2, diterima, pertuduhan (P3) kerana bersubahat dengan membantu sepertimana dibuat terhadap perayu tidak boleh dikekalkan kerana perlakuan atau tindakan yang dikatakan telah dilakukan terhadap perayu tidak membentuk persubahatan dengan membantu dari segi undang-undang.

**Diputuskan**, menolak rayuan:

(1) SP1 adalah, dalam keadaan kes ini orang yang mempunyai kuasa, setakat

mana perayu adalah berkaitan. Berdasarkan fakta kes ini, adalah mudah membuat inferens bahawa SP1 merupakan ejen SP2 dan pasukan pengurusan syarikat yang sedang menyiasat ketidakseimbangan yang disyaki dalam akaun-akaun kewangan syarikat dalam sistem di mana perayu adalah salah seorang daripada mereka dalam syarikat yang mempunyai akses eksklusif ke dalam sistem tersebut dan yang mana kata laluan/kod laluan disyaki telah digunakan untuk memasukkan jumlah-jumlah palsu ke dalam sistem itu sehingga memberi gambaran bahawa bayaran-bayaran yang tertunggak dalam akaun-akaun tersebut sememangnya telah dijelaskan (lihat perenggan 9).

(2) Mahkamah bawahan adalah wajar dalam penemuannya tentang perkara yang dikatakan dorongan. Mahkamah ini bersetuju dengan mahkamah bawahan bahawa tiada dorongan yang wujud daripada SP1 yang telah dilakukan ke atas perayu. Bahkan, HMS telah berkata di ms 255 RoA seperti berikut: 'Daripada keterangan pernyataan tertuduh yang menyatakan bahawa beliau telah diugut dan dijanji serta diberi dorongan adalah tidak berasas'. Oleh demikian, mahkamah bawahan adalah betul dalam penemuannya bahawa pengakuan tersebut telah diberikan secara sukarela dan patut diterima sebagai keterangan terhadap perayu dan ditandakan sebagai P1 dan P2 (lihat perenggan 11).

(3) Tindakan-tindakan perayu membantu Eugene Chai hanya tindakan-tindakan disebabkan perjanjian yang dicapai antaranya dan Eugene sebelum Eugene memulakan usaha jenayah dan menyalahi undang-undangnya, iaitu JPA. Tanpa persetujuan perayu ini untuk memanipulasikan akaun syarikat Eugene tidak mungkin melakukan JPA kerana dia tidak mungkin dia melesapkan wang milik syarikatnya yang mana dia merupakan ejen, daripada pelanggan-pelanggan syarikat itu tanpa dikesan. Oleh itu, tindakan persubahatan oleh perayu ini telah mengakibatkan Eugene meneruskan rancangannya melakukan JPA terhadap kutipan tunai syarikat. Persubahatan perayu dalam usaha menyalahi undang-undang ini telah banyak dibantu oleh Eugene dalam melakukan kesalahan JPA. Oleh itu, berdasarkan keterangan yang dikemukakan, jelas kesalahan persubahatan dengan membantu telah dilakukan oleh perayu (lihat perenggan 22).

(4) Bahkan, apa yang dinyatakan dalam pertuduhan P3 mengandungi tindakan-tindakan yang merupakan sebahagian daripada perjanjian penting antara perayu dan Eugene. Meskipun ia dilihat seperti telah dilakukan selepas tindakan-tindakan JPA selesai, ia merupakan tindakan-tindakan yang dimulakan dan didorong oleh perjanjian terdahulu antara mereka. Dalam erti kata berikut, tindakan-tindakan tersebut telah diatur terlebih dahulu untuk menutup jejak perbuatan mereka yang tidak sah itu yang jelas dapat dilihat dalam P1 dan P2 (lihat perenggan 26).

(5) Dalam kes ini, pertuduhan adalah untuk persubahatan, dan pendakwaan tidak perlu memperincikan tindakan-tindakan perayu dengan tepat yang difikirkan dengan jelas menunjukkan persubahatan. Ia boleh dijadikan keterangan. Dalam pertuduhan itu pemasukan tindakan-tindakan memasukkan jumlah palsu ke dalam sistem syarikat perayu terlalu banyak dan tidak diperlukan untuk diletakkan dalam pertuduhan kerana persubahatan. Walau bagaimanapun, ia tidak mengakibatkan pertuduhan itu cacat. Jika apapun, cuba menyatakan lebih daripada apa yang diperlukan dari segi undang-undang. Ia tidak mengakibatkan apa-apa prejudis terhadap perayu dalam menyediakan pembelaannya sehingga menyebabkan kegagalan melaksanakan keadilan. Kesilapan membuat pertuduhan (P3) oleh pendakwaan dengan itu telah hanya membentuk luar aturan yang tidak menjadikan keseluruhan prosiding tidak sah (lihat perenggan 30).

(6) Berdasarkan keterangan yang ada, perayu telah melakukan persubahatan cabang (c) di bawah s 107 Kanun Keseksaan ('Kanun') dibaca bersama s 409 Kanun yang sama. Begitu juga, tindakan-tindakannya memenuhi cabang (b) seksyen yang sama. Dia boleh disabitkan atas salah satu daripada cabang tersebut. Apapun, perayu jelas telah melakukan tindakan jenayah persubahatan sepertimana yang termaktub di bawah s 107 Kanun (lihat perenggan 31).]

**Notes**

For a case on criminal breach of trust, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 108.

For cases on admissibility of confession, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 775–777.

For cases on charge in general, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 952–1386.

**Cases referred to**

*Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

*Hazari Lal v Ratan Lal & Ors* AIR 1921 Pat 286 (refd)

*King, The v Tara Singh* [1933] MLJ 40, HC (refd)

*Lee Kim Ching, Re* [1974] 2 MLJ 44, HC (refd)

*PP v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180, HC (refd)

*PP v Ma'arif* [1969] 2 MLJ 65, HC (refd)

*Pyare Lal Bhargava v The State of Rajasthan* AIR 1963 SC 1094 (refd)

*Quinn v Leathem* [1901] AC 495, HL (refd)

*R v AB* (1986) 26 CCC(3d) 17 (Ont CA) (refd)

*R v Cleary* (1964) 48 Cr App R 116 (refd)

*R v Notham* (1968) 52 Cr App R 97 (refd)

*R v Richards* (1967) 51 Cr App R 266 (refd)

**Legislation referred to**

Criminal Procedure Code s 422
Evidence Act 1950 s 24
Penal Code ss 107, 107(b), (c), 109, 120A, 409
Penal Code [IND] ss 107, 197

*Kamarul Hisham (The Chambers of Kamarul Hisham & Hasnal Rezua) for the appellant.*
*Ahmad Kamal (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.*

**Abang Iskandar JC:**

**[1]** This has been an appeal against the conviction entered and sentence imposed against the appellant for an offence of abetting an offence of criminal breach of trust, an offence under s 109 of the Penal Code read with s 409 of the same Code. He was sentenced to four years imprisonment with effect from the date of sentence by the learned sessions court judge sitting at Shah Alam ('the SCJ'). However, pending the hearing of his appeal in this court, the appellant has been granted a stay of execution of the said sentence of imprisonment.

**[2]** The bones of contention in this appeal have been broadly concerned with two issues, namely:

(a) That the court below had erred in not having ruled the purported *confession* made to SP1 had been given as a result of an *inducement* exercised by SP1 on the appellant, bearing in mind that SP1 was the appellant's superior, thus a person in authority;

(b) That even on the supposition that the said confession as contained in P1 and P2 (being the records of the interview between the appellant and SP1 which contained the impugned confession) was admissible, the charge (P3) for *abetment by aiding* as preferred against the appellant could not be sustained;

**[3]** With regards to (a) above, the purported confession in this case was admitted under s 24 of the Evidence Act 1950 because the court below was satisfied that it was given by this appellant to SP1 *voluntarily*, in the sense that it had been given without any use of force, promise or inducement exercised by SP1 which otherwise would have rendered the confession as tainted and inadmissible.

**[4]** Before this court it was argued, quite persuasively I must say, by learned counsel that both P1 and P2 ought not to have been admitted on the following grounds, namely:

(a) That SP1 was, for all intents and purposes, *a person in authority* within the meaning of s 24 of the Evidence Act 1950; and

(b) That there had been *inducement* exercised by the SP1 on this appellant as a result of which P1 and P2 came into being.

**[5]** Section 24 of the Evidence Act 1950 sets out the parameters within which a confession given to a person in authority can be admitted as evidence, in that it must have been voluntarily given. In a criminal trial, in a situation where the prosecution intends to use such a confession against an accused person (being its purported maker), and if an objection is taken thereto, the burden lies on the prosecution to prove beyond a reasonable doubt to the court that the said confession had been given by the accused person voluntarily and the accused person needs only to raise a reasonable doubt that it had been obtained involuntarily to render it inadmissible.

**[6]** With regards to (a) above, the lower court had apparently regarded that SP1 was *not* a person in authority in relation to the appellant and in so holding, the court had relied on the evidence of SP1 during the trial within a trial to determine the voluntariness of the impugned confession, where he had said: 'I am not superior to Raymond Ooi (the appellant). We have the same function.' It was also observed by the court below that the said evidence of SP1 that he was not the superior of the appellant was not challenged by the appellant. As is trite, a failure to cross-examine the relevant witness amounts to an admission by the other party of the fact that was not challenged. The court below had also referred to the evidence of this appellant himself where he had said that SP1 was not his direct boss and that his direct boss was Lui Boo Peng. In the case of *Re Lee Kim Ching* [1974] 2 MLJ 44, Justice Wan Hamzah J (as he then was) said that as PW2 and the offender in the case before him were mere *co-workers* therefore s 24 of the Evidence Act had no application. In the case of *The King v Tara Singh* [1933] MLJ 40, it was ruled that a watchman who had arrested the accused person was not a person in authority.

**[7]** Learned counsel before me had strenuously argued, that the factors that should determine whether a person ought to be ruled as a person in authority should be those factors which were immediately present before the appellant purportedly gave the impugned confession. Not a few cases were cited in support of his contention to that effect. For instance, he had mentioned the cases of *R v Cleary* (1964) 48 Cr App R 116; *R v Richards* (1967) 51 Cr App R 266; *R v Notham* (1968) 52 Cr App R 97. Suffice for me to repeat here what Justice Subba Rao, in the case *Pyare Lal Bhargava v The State of Rajasthan* AIR

1963 SC 1094 had said to the effect that it was a question of fact in each case whether the person concerned was a man in authority or not and that it was to be decided based on the circumstances prevailing therein. In this case before me, SP1 was asked by SP2 to interview this appellant in order to find out what had happened with the financial accounts of some of the company's customers. That interview was held in SP1's room in the latter's office and only the two of them were present in the room during the interview. It was argued by learned counsel that SP1 was actually an agent of the company's management team and that fact had taken him out of the category of SP1 being a mere co-worker vis-a-vis this appellant. As such, it was the view held by learned counsel that SP1 being an interviewer in the context of this case, must be deemed to be a person in authority as envisaged under s 24 of the Evidence Act 1950.

**[8]** In the court below, the SCJ had said that there was no evidence led to show that SP1 was a person in authority. According to her, the evidence by the SP1 that he was 'not superior to Raymond Ooi (tertuduh). We have the same function' was not challenged and as such must be deemed to have been admitted by the appellant. Though she did not make an express finding as such, it is quite apparent that the SCJ had treated SP1 as a mere co-worker and that SP1 was not a person in authority in relation to the appellant. But somehow, the court below had proceeded to consider the issue of the voluntariness of the impugned confession given by this appellant. If indeed SP1 was not a person in authority, then the issue of voluntariness ought not to feature in the equation, as was clearly seen in the case of *Re Lee Kim Ching*. Nevertheless, even if the SCJ had erred, she had indeed erred in favour of the appellant and to my mind the appellant was not prejudiced by it.

**[9]** In the case of *R v AB* (1986) 26 CCC(3d) 17 (Ont CA), Cory JA when considering a question posed before him as to whether AB's mother and the doctors were persons in authority, had occasion to say, inter alia, the following: '(5) The question as to whether the statement was made to a person in authority will be viewed subjectively, that is to say, from the point of view of the accused person who made the statement. The proper test is the one given in Kaufman, *Admissibility of Confessions in Criminal Matters* (3rd Ed) (1979) at p 81: 'Did the accused truly believe, at the time he made the declaration, that the person he dealt with had some degree of power over him?' Applying the said test as articulated by Kaufman to the factual matrix of this case before me, I would agree with learned counsel's argument to the effect that SP1 was, in the circumstances of this case a person in authority, in so far as the appellant was concerned. From the facts of this case, it can be readily inferred that SP1 was an agent of SP2 and of the company's management team who were in the midst of investigating into the suspected irregularities in the company's financial accounts in the system where this appellant was one of those people in the company who had exclusive access into the said system and whose unique

password/code had been suspected to have been used to key in fictitious figures into the system thereby giving an impression that payments which were due in those accounts had indeed been accounted for. SP2 had said in his evidence that after he had discovered some suspicious entries with respect to the accounts of the company's customers namely How Fook Trading Sdn Bhd and special events account, he had reported the same to his top management. According to SP2, the management then decided to undertake an investigation into the matter and: 'Bahagian Pengurusan telah lantik Ho Teck Fook, Pengurus Pentadbiran di Johor Bahru untuk mengetuai siasatan' (p 56 of the record of appeal ('RoA')). Ho Teck Fook was SP1 in this case and to whom the appellant had purportedly given P1 and P2 which contained the appellant's damning confession. That would put him in a formal relationship vis-a-vis the SP1 who was specifically assigned to interview the appellant on behalf of the management. Had SP1 not been so appointed, to my mind, he had no business interviewing this appellant on the accounts at all. That was not his usual function. Indeed when cross-examined by the DPP on whether SP2 had used the word 'interrogate', this appellant had said as follows: 'A: I cannot actually recall the word 'interrogate' but he said he'll send someone' (pp 143–144 of the RoA). As such, although they may be co-workers at the same job level function in the company, the moment SP1 was assigned to interview this appellant by SP2, in the eyes and subjective mind of this appellant, SP1 had become a person in authority within the legal embrace of s 24 of the Evidence Act 1950. I noted that SP1 had said in his evidence during the trial-within-a-trial to the effect that he was not superior to the appellant and that they had the same function (p 137 of the RoA). Had the appellant privately confided in SP1 on his own accord as a fellow co-worker and not in formal setting like what had happened in this case, I would have no difficulty at all in concluding that the provisions under s 24 of the Evidence Act 1950 ought not to apply. But in the given circumstances obtaining in this case, if the Kaufman's question was to be posed, it is my considered view that, the inevitable answer would be in the affirmative. As such, SP1 was for all intents and purposes, a *person in authority* in relation to the appellant.

**[10]** That must then bring us to the next issue as stated in (b) above of whether there was any *inducement* was exercised by the SP1 on this appellant during the said interview which culminated in the existence of the impugned confession (P1 and P2). Learned counsel had argued that there was inducement coming from the SP1 that had instigated this appellant to pour out his purported confession as appear in P1 and P2. Alternatively, he had argued that the court below did not direct its mind on the *alleged inducement coming from the said SP1 to this effect, namely that SP1 had said to the appellant that in order that he did not go behind bars and be in darkness he had to co-operate to flush out the mastermind*.

**[11]** I had occasion to review the RoA on this issue and to be fair to the SCJ, this issue of inducement had indeed been adverted to and considered by her. I have found that after due consideration, the SCJ below had found as a fact that the confession had been given by this appellant to SP1 voluntarily. The matter of the alleged inducement as articulated above was suggested to SP1 in the TWT and it was denied. The court below had found as a fact that there was no inducement exercised by SP1 on this appellant during the interview. I had looked at the RoA and I found that the alleged words of inducement coming from SP1 were put across to him during cross-examination by counsel for the appellant in the trial within a trial (TWT). In fact, it was recorded during the TWT when this appellant was cross-examined by the DPP as follows: 'Q: The moment you signed ID1 and ID2 that indicates that you gave the statement voluntarily. A: Yes' (p 144 of the RoA). Although in his re-examination, this appellant had said that when he gave the confession during the interview with SP1 he 'was not in the correct frame of mind' (p 144 of the RoA) and therefore he had not given the ID1 and ID2 voluntarily, it was also recorded during his cross-examination that he was not sick when ID1 and ID2 were done and that he was okay at that particular time (p 143 of the RoA). From this, the court below was justified in its finding on the matter of the alleged inducement. On that account, I agree with the court below that there was no inducement emanating from SP1 that had been brought to bear on the appellant. In fact, the SCJ had said at p 255 of the RoA as follows: 'Daripada keterangan pernyataan tertuduh yang menyatakan bahawa beliau telah diugut dan dijanji serta diberi dorongan adalah tidak berasas.' Such being the case, the court below was correct in finding that the confession was therefore given voluntarily and ought to be admitted as evidence against the appellant and marked as P1 and P2. As such, I cannot agree with learned counsel that the court below had not directed its mind on the issue of *inducement* and its attendant facts cannot, with respect, be sustained. Indeed, in the light of the fact that the SCJ had ruled that SP1 was a mere co-worker vis-a-vis the appellant, the issue of inducement should not have featured in the scheme of things before her.

**[12]** Now, the next issue to consider relates to the charge, which according to learned counsel, cannot stand because alleged conduct or acts attributed to the appellant cannot in law amount to abetment by aiding. Perhaps at this juncture it would be most appropriate to reproduce in toto, the said amended charge P3, which had been preferred against this appellant. In its original language, it reads as follows:

> Bahawa kamu di antara 2 September 2000 hingga 4 September 2000 di No 1 Jalan Bukit Belimbing 26/38 Seksyen 26, di dalam Daerah Shah Alam, di dalam Negeri Selangor Darul Ehsan, telah mengambil bahagian atau membantu Chai Swee Teik melakukan pecah amanah jenayah berkenaan sesuatu harta iaitu RM61,148.00 dengan memasukkan maklumat palsu ke dalam akaun syarikat walhal kamu tahu bahawa maklumat tersebut sebenarnya tidak wujud, dan dengan itu kamu telah

A melakukan satu kesalahan yang boleh dihukum di bawah seksyen 109 Kanun Keseksaan dibaca bersama seksyen 409 Kanun Keseksaan.

**[13]** In this regard, it was argued by learned counsel as it stood, the said charge was misconceived, given the factual circumstances of this case. The argument on this matter had gone like this: Granted that this appellant could have keyed into the system fictitious figures, those acts had been done ex post facto the offence of criminal breach of trust by the now deceased principal offender, namely, Eugene Chai. Having considered the evidence against this appellant, the SCJ had finally said that the acts of the appellant had the effect of *completing* the offence of *criminal breach of trust* ('CBT') committed by the co-accused Eugene Chai. The exact words used in the court below had gone like this: 'Tindakan Ooi Juan Seng ini *melengkapkan* kesalahan yang dibuat oleh Eugene Chai Swee Teik dalam melakukan pecah amanah jenayah' (see p 248 of the RoA).

**[14]** In the course of his submissions, learned counsel had referred this court to the work by Sir John Smith as contained in the famous book entitled, *Criminal Law* (8th Ed). He had quoted to this court this particular paragraph in the said book which reads as follows:

> 4 The time factor
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> Assistance given *before* the offence is committed will ground liability so it is only as regards the conclusion of the offence that time becomes important. Assistance given when the principal is *no longer* in the course of commission of the offence — to enable him to escape or to reap the benefits of the commission of the offence — does *not* amount to abetting. Where D1 broke into warehouse, stole butter and deposited it in the street thirty yards from the warehouse door, D2 who came to assist in carrying it off was held not guilty of abetting in larceny. Assistance given to murderer, after his victim is dead, to a rapist after the act of intercourse has concluded, or to a bigamist after the second ceremony of marriage, cannot ground liability for the crime in question. One who, without any *pre-arranged plan*, joins in an attack on P after P has received a fatal injury, is not guilty of homicide (though he be guilty of an attempt) if his action in no way contributes to P's subsequent death.

**[15]** At this juncture, it would be appropriate to look at the offence of abetment and s 107 of our Penal Code clearly encapsulates the definition of this criminal conduct.

> 107 A person abets the doing of a thing, who —
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> *First* — Intigates any person to do that thing; or
>
> *Secondly* — Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

*Thirdly* — Intentionally aids, by any act or illegal omission, the doing of that thing.

**[16]** The learned commentators of *The Indian Penal Code* by Ratanlal and Dhirajlal (24th Ed) at pp 96–98 had the following comments on this section:

Comment — When an offence is committed and several persons take part in the commission of it, each person may contribute in a manner and degree different from the others to the doing of the criminal act.

**[17]** The act may be done by the hands of one person while another is present or is close at hand ready to afford help; or the actual doer maybe a guilty agent acting under the orders of an absent person; and besides these participators, there may be other persons who contribute less directly to the commission of the offence by advice, persuasion, incitement, or aid. It is proper to mark the nature and degree of participation which is essential to criminal liability, but it will be seen that the several gradations of action above referred to are not always treated as denoting necessarily different measures of guilt with a view to distinctions in respect of punishment.

**[18]** For the purposes of the first two clauses of this section it is immaterial whether the person instigated commits the offence or not or the persons conspiring together actually carry out the object of the conspiracy. It is not necessary for the offence of abetment that the act abetted must be committed. It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail when the person alleged to have committed the offence is acquitted of that offence.

**[19]** Abetment is constituted by:

(a) instigating a person to commit an offence; or

(b) engaging in a conspiracy to commit it; or

(c) intentionally aiding a person to commit it.

Abetment by instigation

Abetment by conspiracy — Second clause

**[20]** 'Conspiracy' consists in the agreement of two or more (persons) to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry in into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if

lawful, is punishable if for a criminal object or for the use of criminal means. It is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of the offence. Where parties concert together, and have a common object, the act of one of the parties, done in furtherance of the common object and in pursuance of the concerted plan, is the act of all.

**[21]** For an offence under the second clause of this section a mere combination of persons or agreement is not enough; an act or illegal omission *must take place in pursuance* of the conspiracy. But for an offence under s 120A a mere agreement is enough if the agreement is to commit an offence.

Abetment by aid — Third clause — By act

**[22]** A person abets by aiding, when by act done either prior to, or at the time of, the commission of an act, he intends to facilitate, and does in fact facilitate, the commission thereof (vide Explanation 2). For instance, the supplying of necessary food to a person known to be engaged in crime is not per se criminal: but if food were supplied in order that the criminal might go on a journey to the intended scene of the crime, or conceal himself while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of the crime and might facilitate it. In order to constitute abetment by aiding within the meaning of the third paragraph of s 107 of the IPC, the abettor must be shown to have intentionally aided the commission of the crime. A person may invite another casually or for a friendly purpose and that may facilitate the murder of the invitee. But unless it is shown that the invitation was extended with a view to facilitate the commission of the murder, it cannot be said that the person extending the invitation had abetted the murder. The language used in the section is 'intentionally aids' and therefore, active complicity is the gist of the offence of an abetment under the third paragraph of s 197 of the IPC. Mere presence at the commission of a crime cannot amount to intentional aid unless it was intended to have that effect. To be present and aware that an offence is about to be committed does not constitute abetment unless the person thus present holds some position of rank or influence such that his countenancing what takes place may, under the circumstances, be held a direct encouragement, or unless some specific duty of prevention rest on him, which he leaves unfulfilled, in such wise that he may be safely taken as having joined in a conspiracy for the preparation of the offence'.

**[23]** The fact of the matter is that the offence of criminal breach of trust ('CBT') is a separate and distinct offence from abetment and *legally*, as in this case, the former was completed *even without* the keying-in of the fictitious figures into the system by the appellant. The offence of CBT is complete the moment an accused person entrusted with the custody or management of the property dishonestly misappropriates the same property. Any act of abetment

must be done at *any point in time before* the CBT is completed, not *after*. So, the observation by the SCJ that the acts of the appellant as captured in P4 and P5 had helped to *complete* the commission of the offences of CBT by Eugene, with respect, was not entirely accurate, if taken literally and in isolation. Even if the appellant did not key in the false particulars into the system of the company, the fact that Eugene had collected the cash payments from the relevant customers and not remit it to the company as he should have, the offence of criminal breach of trust by him was *complete*.

**[24]** In this appeal before me, it was submitted by learned counsel that when the appellant keyed in the cheque numbers purportedly to indicate to the company that monies had indeed been paid by the two customers, the proverbial horse had by then bolted. On that account, it was therefore contended that the evidence as it had stood in this case had shown that those acts of the appellant could not amount to an act of abetment of Eugene's act of criminal breach of trust. In the context of the factual matrix in this case, is that contention correct?

**[25]** From a perusal of the evidence in this case, it is quite apparent to me that the direct evidence of complicity of the appellant in this case had come from the contents of P1 and P2, namely the purported confession from the appellant to SP1. The other evidence as contained in P4 and P5 that pointed to the user id 'MQ' being exclusive to the appellant was a basis upon which the posting of the cheque numbers captured therein was traceable to the appellant. Those factual circumstances must have been the justification to refer the same in the charge P3, as follows: 'mengambil bahagian atau membantu Eugene melakukan jenayah pecah amanah *dengan cara memasukkan maklumat palsu* ke dalam akaun syarikat.' Actually what happened has been that this appellant had agreed to help Eugene to commit CBT on the company's collection from its customers namely Peter Tan's special events and How Fook Trading's accounts, by way of manipulating the account of the company's account system by keying in fictitious figures purporting to show that payments that had been due had been paid and accounted for although, as a matter of fact, those cash payments had been siphoned off and shared between him and Eugene. The appellant had been given a unique and exclusive code to access the company's account in the system and postings traceable to his unique code relating to the account had created suspicion that later lead to an internal investigation culminating in the appellant owning up to the fraudulent entries into the said account. Hence, the appellant was prosecuted on the said charge (P3). So he was charged for taking part or aiding Eugene Chai in the commission of the offence of CBT in the sense that his role would be to manipulate the account of the company to reflect that current payments which were due had been paid to the company by the customers, so as not to arouse suspicions that something was amiss with the collections of payments from the customers. In other words, the acts of the

A appellant in abetting by aiding Eugene were mere acts which were consequences of the agreement that had been reached between him and Eugene before Eugene could begin his illegal and criminal enterprise, namely the CBT. Without this appellant's consent to manipulate the company's account, Eugene would not have committed the CBT because there was no way he could deprive B the cash belonging to his company of which he was an agent, from the company's customers without being detected. So, the act of abetment by this appellant had resulted in Eugene proceeding on with his scheme to CBT the company's cash collection. In fact, it has been written by the learned authors of *Ratanlal and Dhirajlal's Law of Crimes* (24th Ed) Vol 1, Bharat Law House, C New Delhi, at p 397 when commenting on s 107 of the Indian Penal Code (in pari material with the corresponding provisions in our Penal Code) as follows: 'Abetment under the Penal Code involves active complicity on the part of the abettor *at a point of time prior* to the actual commission of the offence, and it is of the essence of the crime of abetment that the abettor should substantially D *assist* the principal culprit *towards* the commission of the offence. Nowhere concurrence in the criminal acts of another without such participation therein as helps to affect the criminal act or purpose is punishable under the Code. Nor does mere negligence amount to abetment.' This is because, as has been clearly written in the commentaries by the learned authors in *Ratanlal and Dhirajlal's* E *Law of Crimes* (24th Ed) at p 412, 'An act done *after* an offence is complete which might help the offender, does not amount to abetment'. In so concluding, the case of *Hazari Lal v Ratan Lal & Ors* AIR 1921 Pat 286 was cited in support thereof.

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**[26]** Taken in isolation, those acts of keying in the fictitious figures into the system of the company cannot amount to abetment by aiding. However, in this case, the appellant's portion of the bargain as could be seen in his own words in P1 and P2 has been *two fold*. They consisted of acts that were critical in order G that a 'perfect crime' of criminal breach of trust could be pulled off by Eugene, the principal offender in this case. Frankly, they had nearly succeeded in achieving that 'perfect' feat.

**[27]** In this case, the appellant's complicity in the illegal enterprise had H substantially assisted the principal offender (Eugene Chai) towards the commission of the crime of CBT. The evidence, in particular P1 and P2, ought to be viewed as an *integral whole*. Actually, looking at P1 and P2, I would say that the factual circumstance that had clearly emerged has been that there was an agreement between the appellant and Eugene Chai to defraud their I employer company. *Via this agreement*, the appellant had agreed 'to release the on hold order' from the two identified customers who paid their drink consignments in *cold cash*. *The plan was simple, Eugene would have the drinks delivered and he would collect the cash payments from the said customers and then not remit the cash collections but rather he would share the proceeds with the*

*appellant*. However, for this plan to work, the appellant on his part needed to do something *first*, and that would be, for him to release the 'on hold orders' of these identified customers. Once that was done, Eugene would then play his part with respect to delivery of the drinks and *the collection of the cash payments*. It was also part of the plan for Eugene to give the appellant his personal cheques from his current account held at RHB Bank. The *second* part of the bargain was for the appellant to then key these cheques numbers into the company's computer system to indicate that payments had been made by those customers when in fact the cheques were worthless and were never banked in. This was done to pull wool over the management's eyes and to avoid the scheme from being detected. This was clearly borne out from the P1 and P2. Apart from P1 and P2, the evidence of the other witnesses had shown that the appellant had the password to access into the system to release the on hold orders and that he was the sole owner of user ID 'MQ'. So the appellant was well placed to execute his part of the deal with Eugene. According to the appellant in P1 and P2 he had destroyed the said cheques when the company had moved their office from KL to Shah Alam. It must be emphasised that both the principal and the abettor (appellant) had proceeded to execute their respective parts of the bargain. As such, it was not just mere agreement to commit an illegal act because they had actually executed acts in pursuance of the conspiracy. Looking at P5A, the dates of entries of the cheque numbers (under heading 'movement date') had coincided with the dates of the temporary receipts that were issued by Eugene to the customers. So, the acts of keying in the cheque numbers were at about the same time as when Eugene had collected the cash from the customers.

**[28]** One cannot underscore the fact that with *the acts of releasing of the* 'on hold orders' *by the appellant*, Eugene Chai, the principal offender, was able to deliver the drinks to the customers and he went on to collect the cold cash payments from them, which were then misappropriated by both of him and the appellant. Although there was no evidence led as to when specifically did the appellant release such orders from the system, it was nevertheless clear from the evidence of SP9 (Lui Bu Peng) that the appellant had the password to authorise the release of such orders. In the light of the totality of the other surrounding evidence, the irresistible conclusion must be that he must have authorised the orders in respect of the two said accounts in order to enable Eugene to put into play his part of the agreement. In fact, in P1 and P2, the appellant had confessed to having released the on hold orders. Actually, at p 270 of the RoA, the appellant had said in P1 in answer to question 14 therein, as follows: 'Each time when I released the 'invoice on hold' Eugene handed over a cheque equivalent to the invoice amount and I posted the cheque #(number) into the debtor a/c to offset against the invoices as payment. But the cheque was never bank into FNCC bank account. I kept all the cheques issued by Eugene and the cheques were destroyed and throw away when we moved office from KL to Shah Alam in '00'. This must be true because without such acts of release, the

deliveries could not have been done and Eugene could not have been able to collect the cash from the two customers. In so doing, the appellant had abetted Eugene by assisting him towards the commission of the offence of CBT, for without those acts of release of the order, he would not have been able to collect the cash that was subsequently not duly remitted to the company. Those acts of release constituted the *first part* of the appellant's side of the bargain with Eugene. The acts which were attributable to this appellant as appear in P4 and P5 were but the manifestations of the *second part* of the agreement to abet by him. Those manipulative acts of the accounts were done the moment Eugene had given him his worthless cheques whose numbers were to be keyed in into the system by the appellant and these acts of keying in were also instrumental to pull the wool over the non-suspecting eyes of the company's finance staffs. So, the abetment in this case consisted of not only the ones captured in P4 and P5, but the also earlier acts of the appellant in releasing the hold orders which effectively cleared the path for Eugene to deliver the drinks to the two retail customers and to then collect the cash payments from them. As could be seen in P1 and P2, the rest as one would be apt to say, is history.

**[29]** In this case, from the evidence adduced, clearly an offence of abetment by way of aiding had been committed by the appellant. Actually what was set out in the charge P3 consisted of acts which were *part* of *an integral agreement between the appellant and Eugene*. Although they appeared to be done *after* the acts of CBT had been completed, they were acts which were actuated and motivated by the earlier agreement between them. In that sense, these acts were *pre-arranged* to cover the tracks of their unlawful design which was clearly discernible in P1 and P2. The presence of the pre-arranged plan between the appellant and Eugene in this case would *distinguish* this case from the examples cited by the learned writer Sir John Smith in his book *Criminal Law* referred to this court by learned counsel, En Kamarul Hisham.

**[30]** Equally clear from the evidence as adduced by the prosecution, an offence of *abetment by conspiracy* had been committed by the appellant. According to the learned commentators in *Ratanlal and Dhirajlal's Law of Crime* (24th Ed), when commenting on s 107 of the Indian Penal Code, in particular, abetment by conspiracy (the second clause), 'Conspiracy' *consisted in the an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means*. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, is punishable if for a criminal object or for the use of criminal means. For this, the case of *Quinn v Leathem* [1901] AC 495 was cited. *It is sufficient if he engages in the conspiracy in pursuance of which the principal offence is committed*. The evidence as adduced before the court below had, to my mind, amply shown the complicity of the appellant in the commission of *abetment by conspiracy* beyond reasonable

doubt. P1 and P2 clearly showed the substantial roles which were played by the appellant towards the commission of the offence of CBT by the principal offender, not by accident but rather by deliberate design and complicity on his part.

**[31]** An appeal has been described as an extension of a trial and everything is open to review and the appellate court is competent to evaluate the overall evidence adduced in order to ensure that the findings made by the lower court have been correct so as to ensure that there has been no injustice or miscarriage of justice occasioned to both parties, as can be seen in the decision by Justice Abdul Hamid J (as he then was) in *Public Prosecutor v Ma'arif* [1969] 2 MLJ 65.

**[32]** It is also to be noted that in a charge for abetment it was *not* necessary to spell out which of the three clauses of abetment was concerned in the commission of the offence. This could be seen clearly in the commentary in the *Law of Crimes by Ratanalal and Dhirajlal* (24th Ed) at p 423, where the sample charge framed for abetment under the Penal Code was laid down as follows:

> That you …, on or about the … day of …, at …, *abetted* the commission of the offence of... by … which was committed in *consequence of your abetment*, and that you have hereby committed an offence punishable under sections 109 and … of the Indian Penal Code, and within the cognizance of my court (or the Court of Session).

**[33]** Now, worthy of note is the fact that there is the *absence* of any specific reference to any particular limb contained under s 107 as defining the acts that could amount to abetment. In the celebrated case of *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180, the charge preferred against the accused was similarly framed and the learned Justice Eusoffe Abdoolcader J (as he then was) had said nothing or anything against it. It would be for the court to make the necessary finding, at the end of the prosecution case based on the evidence as adduced at that stage, whether the charge of abetment has been made out. In this case, the charge was for abetment, and there was no need for the prosecution to particularise the exact acts of the appellant that was thought to be manifestations of abetment. That would go to *evidence*. To my mind, the inclusion in the charge of the acts of keying in the fictitious figures into the system of the appellant's company had been superfluous and unnecessary to be put in the charge for abetment. However, that would not render the charge defective. If anything, it tried to say much more than has been legally required. To my mind, it has not occasioned any prejudice to the appellant in the preparation of his defence which would thereby causing a failure of justice. The error in the framing of the charge (P3) by the prosecution therefore had amounted to a mere irregularity that ought not to vitiate the whole proceedings. This kind of a situation would justify this court in invoking the clear provisions of s 422 of the Criminal Procedure Code.

A As such, this court would not be discharging its duty if it were to ignore the evidence that was staring into its face, especially in the light of the confession of the appellant as contained in P1 and P2 which had been rightly admitted as evidence in the court below by the SCJ.

B **[34]** The defence led by the appellant had been that he had been done in by persons who had used his 'user id' without his authorisation. He had also said that alleged his confession as contained in P1 and P2 was not his words and/or that the said confession had been forced out of him. The SCJ had found that the defence put up by the appellant had failed to raise any reasonable doubt on C the prosecution's case. To her mind, the contents of P1 and P2 were so detailed that it could only have been narrated by a person who had close personal knowledge about the whole scam. I agree with her conclusion. As such, he would not have been prejudiced in his defence as a result of this court's findings as regards his apparent commission of abetment by conspiracy. On the D available evidence, the appellant had committed limb (c) of abetment under s 107 of the Penal Code read with s 409 of the same Code. Likewise, his acts had also fulfilled the limb (b) of the same s. He could have been convicted on either one of the said limbs. Either way, the appellant had clearly committed the criminal act of abetment as envisage under s 107 of the Penal Code. I E therefore would confirm the conviction as entered against the appellant by the SCJ.

**[35]** Before I leave this appeal, there is just one other thing that attracted my attention, which is of no less significance, when appreciating an accused F person's defence in a criminal trial. Specifically, it relates to what the SCJ had commented, in the course of her judgment, when considering the defence, on the failure on the part of the appellant to explain to the police during investigation, as to what had taken really place, if he was truly innocent, as appear in her grounds of judgment at p 262 of the RoA, as follows:

G > Seterusnya semasa penyiasatan polis, tertuduh tidak mahu mengatakan apa-apa tetapi ingin menyatakan keterangan beliau di mahkamah. Jika benar tertuduh telah dianiayai seperti yang beliau nyatakan sepanjang keterangan beliau, mengapa tidak beliau menerangkan kepada pihak polis cerita yang sebenarnya dan menunjukkan penyata bank beliau untuk menunjukkan bahawa beliau tidak bersalah.

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**[36]** In fact, a similar situation had happened in the case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705, such that the Federal Court had found it necessary to say the following, as per Justice Edgar Joseph Jr:

I > Where the judge takes into consideration the belatedness of an explanation offered by an accused for the first time at the trial as diminishing the weight of that explanation this will usually not be fair unless he makes it clear that he recognises the right of the accused to remain silent and that he is not drawing an adverse inference of guilt from such silence.

**[37]** This could amount to a serious misdirection and in appropriate cases, that alone could be ground enough to set aside a conviction so had on account of such misdirection where clearly the accused person's defence had been diminished in the eyes of the trial judge. Nevertheless, having said that, not every incidence of misdirection ought to be ruled as being fatal to the prosecution's case. The litmus test has always been whether an accused person so placed has been materially prejudiced in the defence of his case as a result of such misdirection. In this case, there is overwhelming evidence against this appellant. As such, that apparent misdirection, to my mind, ought not to be ruled as fatal to the prosecution's case, in the light of the evidence that flew across the face of the court that clearly has shown that this appellant on his own confession (as in P1 and P2) had conspired with Eugene Chai to siphon off monies that rightly belonged to their employers (FNCC) for their own benefits illegally, whereby as part of his bargain, this appellant had agreed to release the on hold orders for delivery and to key in the numbers of bogus cheques given by Eugene into the system so as to indicate to management that payments had indeed been paid by the customers for the drinks consignments.

**[38]** As to sentence, I had considered the RoA and I had found that the SCJ had not erred on the application of the sentencing principles to the facts before her. The sentence imposed was not one that could be regarded as being manifestly excessive, given the deliberate role played by the appellant in the whole episode which clearly had not only facilitated the commission of the CBT by Eugene Chai (since deceased) but it had rendered the integrity of the system that was in place in the company, vulnerable and compromised and exposing it to further abuse. As such, I would not tamper nor interfere with the sentence that had been imposed on this appellant by the SCJ.

**[39]** In the upshot therefore, I would dismiss this appeal on the reasons as adumbrated by me above.

*Appeal dismissed.*

Reported by Masrifah Ravendran